September 2021

Decision in Art. 78 proceeding - Jones, Milton (2015-09-11)

Matter of Jones v NYS Bd. of Parole
2015 NY Slip Op 31816(U)
September 11, 2015
Supreme Court, Franklin County
Docket Number: 2015-159
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
MILTON JONES, #82-A-2073,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2015-0086.21
INDEX # 2015-159
ORI #NY016015J

-against-

NYS BOARD OF PAROLE,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Milton Jones, verified on January 7, 2015 and filed in the Franklin County Clerk's office on February 23, 2015. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the July 2014 determination denying him discretionary parole release and directing that he be held for an additional 24 months. The Court issued an Order to Show cause on March 2, 2015 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on April 16, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated April 16, 2015 as well as by the Affirmation of Terrence X. Tracy, Esq., Counsel, New York State of Board of Parole, dated April 10, 2015. The Court has also received and reviewed petitioner's Opposition to the Respondent's Answer and Return dated May 4, 2015 and filed in the Franklin County Clerk's office on May 8, 2015.

On April 23, 1982 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 25 years to life and a consecutive indeterminate sentence of 10 to 20 years upon his convictions of the crimes of Murder 2° and Attempted Murder 2°. The criminal offenses underlying petitioner's

1982 convictions were committed less than six months after he had been released from state custody to parole supervision in connection with a previous (1973) Manslaughter 1° conviction.

After having been denied discretionary parole release on three prior occasions petitioner made his fourth appearance before a Parole Board on July 8, 2014. Following that appearance a decision was issued again denying him discretionary parole release and directing that he be held for an additional 24 months. The July 2014 parole denial determination reads as follows:

> "AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY AND WOULD [SO] DEPRECATE THE SERIOUS NATURE OF THE CRIME AS TO UNDERMINE RESPECT FOR THE LAW. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR INSTANT OFFENSE'S [sic] ARE: MURDER 2, ATT. MURDER 2 IN WHICH YOU STABBED A HELPLESS UNARMED FEMALE STRANGER AND WHEN ANOTHER PERSON AND HER HUSBAND RAN INTO YOU, YOU TRIED TO HARM THEM AND YOU DID SO WHILE ON PAROLE FOR MANSLAUGHTER IN WHICH YOU STABBED AND KILLED ANOTHER VICTIM.
>
> YOUR RECORD DATES BACK TO A 1965 PINS, INCLUDES: 2 FELONIES, 2 MISDEMEANORS, A JUVENILE HISTORY, PRIOR VIOLENCE, PRIOR PRISON, AND JAIL, AND FAILURE AT/PRIOR COMMUNITY SUPERVISION.
>
> NOTE IS MADE OF YOUR SENTENCING MINUTES, COMPAS RISK ASSESSMENT, REHABILITATIVE EFFORTS, RISKS, NEEDS, LETTERS OF SUPPORT, CLEAN DISCIPLINARY RECORD, LACK OF REMORSE, LACK OF INSIGHT, PAROLE PLAN AND ALL OTHER FACTORS REQUIRED BY LAW.
>
> YOU CLEARLY FAIL TO BENEFIT FROM PRIOR EFFORTS OF LENIENCY AND REHABILITATION. PAROLE IS DENIED."

The document perfecting petitioner's administrative appeal from the July 2014 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on August 20, 2014. The Appeals Unit, however, failed to issue its findings and recommendations within the four-month time frame set forth in 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §38-f-1, effective March 31, 2011, provides, in relevant part, as follows:

> "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement . . ."

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis,* 95 NY2d 470, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268, *Vasquez v. Dennis*on, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume

that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Jackson v. Evans,* 118 AD3d 701, *Nankervis v. Dennison,* 30 AD3d 521 and *Zane v. New York State Division of Parole*, 231 AD2d 848.

Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide that the New York State Board of Parole shall ". . . establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."[1] To the extent petitioner argues that the Parole Board failed to adopt, through formal rule making processes, procedures implementing the above-referenced amendment to Executive Law §259-c(4), the Court finds that the promulgation of the October 5, 2011 memorandum from Andrea W. Evans, then Chairwoman, New York State Board of Parole, satisfied the Parole Board's obligations with respect to the 2011 amendment. *See Partee v. Evans*, 117 AD3d 1258, *lv denied* 24 NY3d 901, and *Montane v. Evans*, 116 AD3d 197, *lv granted* 23 NY3d 903, *app dis* 24 NY3d 1052.

Petitioner also argues that the Parole Board focused exclusively on the serious nature of the crimes underlying his incarceration, without adequate consideration of other statutory factors. A Parole Board, however, need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination,

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[1] Prior to the amendment the statute had provided, in relevant part, that the Board of Parole shall ". . . establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."

nor is it required to expressly discuss each of those factors in its written decision. *See Montane v. Evans,* 116 AD3d 197, *lv granted* 23 NY3d 903, *app dismissed* 24 NY3d 1052, *Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination ". . . is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar, reviews of the Parole Board Report (Reappearance July 2014) and transcript of petitioner's July 8, 2014 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's prior criminal record, programing record, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record (clean since 2011 with last "serious ticket" in 2005) and release plans/community support in addition to the circumstances of the crimes underlying his incarceration, including the fact that they were committed while petitioner was at liberty under parole supervision from a previous Manslaughter 1° conviction. The Court, moreover, finds nothing in the transcript to suggest that the Parole Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries.

In view of the above, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See Pearl v. New York State Division of Parole,* 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. Since the requisite statutory

factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality boarding on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying petitioner's most recent incarceration, including the fact that they were committed while petitioner was at liberty under parole supervision from a previous Manslaughter 1° conviction, his prior criminal record and lack of remorse/insight. *See Lackwood v. New York State Division of Parole,* 127 AD3d 1495, *Jones v. New York State Parole Board,* 127 AD3d 1327, *Thompson v. New York State Board of Parole,* 120 AD3d 1518 *and Vaughn v. Evans,* 98 AD3d 1158.

To the extent petitioner purports to rely on *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, the Court finds such reliance misplaced. In *King* the Appellate Division, First Department, not only determined that the Parole Board improperly considered matters not within its purview (penal policy with respect to convicted murders) but also that the Parole Board failed " . . . to consider and fairly weigh all of the information available to them concerning petitioner that was relevant under the statute, which clearly demonstrates his extraordinary rehabilitative achievements and would appear to strongly militate in favor of granting parole." *Id* at 433. The appellate-level court in *King* went on to note that the only statutory criterion referenced by the Board in the parole denial determination was the seriousness of the crime underlying Mr. King's incarceration (felony murder of an off-duty police officer during the robbery of a fast food restaurant). According to the Appellate Division, First Department, "[s]ince . . . the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." *Id* at 433.

This Court (Supreme Court, Franklin County) first notes that although the nature of the crime underlying Mr. King's incarceration was somewhat similar in nature to one of the crimes underlying petitioner's incarceration (Murder 2°), Mr. King had no prior contacts with the law (*id*. at 426) while petitioner has a prior criminal record and committed his instant offenses while at liberty under parole supervision from a prior conviction of a violent felony offense (Manslaughter 1°). These distinguishing features appear to meet the First Department's requirement that a parole denial determination be supported by aggravating circumstances beyond the inherent seriousness of the underlying crime. In any event, however, in July of 2014 the Appellate Division, Third Department - whose precedent is binding on this Court - effectively determined that the above-referenced "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department. *See Hamilton v. New York State Division of Parole,* 119 AD3d 1268. In *Hamilton* it was noted that the Third Department " . . . has repeatedly held - both recently and historically - that, so long as the [Parole] Board considers the factors enumerated in the statute [Executive Law §259-i(2)(c)(A)] it is 'entitled . . . to place a greater emphasis on the gravity of [the] crime' (*Matter of Montane v. Evans,* 116 AD3d 197, 203 (2014), *lv granted* 23 NY3d 903 (2014) [internal quotation marks and citations omitted]' . . ." *Id* at 1271 (other citations omitted). After favorably citing nine Third Department cases decided between 1977 and 2014, the *Hamilton* court ended the string of cites as follows: " . . . *but see Matter of King v. New York State Div. of Parole,* 190 AD2d 423, 434 (1993), *aff'd on other grounds* 83 NY2d 788[2] (1994) [a First Department case holding, in conflict with our precedent, that the

[2] The Court of Appeals in *King* only referenced the fact that " . . . one of the [Parole] Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law §259-i." 83 NY2d 788, 791. The Court of Appeals, however, did not address that aspect

Board [of Parole] may not deny discretionary release based solely on the nature of the crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime]." 119 AD3d 1268, 1272. The *Hamilton* court continued as follows:

> "Particularly relevant here, we have held that, even when a petitioner's institutional behavior and accomplishments are 'exemplary,' the Board may place 'particular emphasis' on the violent nature or gravity of the crime in denying parole, as long as the relevant statutory factors are considered (*Matter of Valderrama v. Travis,* 19 AD3d at 905). In so holding we explained that, despite [the *Valderrama*] petitioner's admirable educational and vocational accomplishments and positive prison disciplinary history, '[o]ur settled jurisprudence is that a parole determination made in accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety' (*id.* [internal quotation marks and citations omitted]). We emphasize that this Court [Appellate Division, Third Department] has repeatedly reached the same result, on the same basis, when reviewing denials of parole to petitioners whom we recognized as having exemplary records and as being compelling candidates for release." 119 AD3d 1268, 1272 (additional citations omitted).

The Court therefore rejects petitioner's argument on this point.

Finally, petitioner notes that the COMPAS instrument scored him as a low risk for committing new felony violence as well as for rearrest and/or for absconding. This Court finds, however, that although the Appellate Division, Third Department, has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056*, Malerba v. Evans,* 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or the amended version of Executive Law §259-c(4), to suggest that the quantified risk assessment determined

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of the Appellate Division, First Department, decision in *King* holding that a parole denial determination must be based upon a showing of some aggravating circumstances beyond the inherent seriousness of the underlying crime.

through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A) including, as here, the nature of the crimes underlying his incarceration, together with the fact that they were committed while at liberty under parole supervision from a prior conviction of a violent felony offense (Manslaughter 1°). *See Rivera v. New York State Division of Parole*, 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901. *See also Lackwood v. New York State Division of Parole*, 127 AD3d 1495.

Based upon all the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: September 11, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice